LIBRARY
SUPREME COURT. U.S.

Office - Supreme Court, U. S.
FILED
OCT 14 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 39

ANTHONY WILKO,

Petitioner,

vs.

JOSEPH E. SWAN, ET AL., INDIVIDUALLY AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF HAYDEN STONE & CO., AND HAVEN B. PAGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

HENRY E. MILLS,
Counsel for Petitioner.

RICHARD H. WELS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 39

ANTHONY WILKO,

Petitioner,

vs.

JOSEPH E. SWAN, ET AL., INDIVIDUALLY AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF HAYDEN, STONE & CO., AND HAVEN B. PAGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

POINT I

Compulsory Arbitration Clauses in the Customer's Agreements Signed by the Petitioner and the Respondent Are Void under the Non-Waiver Provisions of the Securities Act of 1933. The Federal Arbitration Act of 1925 Is Inapplicable Because of the Overriding Provisions of the Securities Act of 1933.

The principal question herein is whether the provisions of the Federal Arbitration Act of 1925 require controversies

between the parties herein to be settled by arbitration, or whether such agreement is specifically voided by the express provisions of the Securities Act of 1933, even if the parties herein have so agreed in writing.

Prior to the enactment of the Federal Arbitration Act, arbitration was unenforceable in the Federal Courts. The purpose of that Act was to *permit*, not to require arbitrations in certain controversies, subject to limited review in the Federal Courts.

The Securities Act of 1933 was enacted subsequently to the Arbitration Act of 1925 and resulted from extensive Congressional investigations into the investment banking and securities fields. The Securities Act evidenced a strong Congressional purpose to afford the purchaser of securities adequate protection against the seller. Congress recognized that the investor must be given adequate weapons in the civil courts, and to this end, shifted the burden of proof from the plaintiff to the defendant in civil actions, and in effect changed the principle of "caveat emptor" to "caveat venditor".

The Securities Act of 1933 provided further that any waiver by the purchaser of securities of his rights under the Securities Act was void.[1] It is significant that Congress used the word "void", and not the word "voidable", which should dispel any notion that this section of the statute is merely mandatory.

The Securities Act of 1933 clearly expressed the purposes of Congress, and more particularly demonstrated conclusively that its non-waiver provisions over-ride any conflicting provisions of the Federal Arbitration Act of 1925.

These arguments have been comprehensively briefed by the Securities & Exchange Commission, which, with the permission of the courts, herein, has appeared as amicus

[1] See U.S.C.A. Title 15, Chapter 2a, Sections 77K and 77L.

curiae. Petitioner herein can add little to what has already been argued so effectively by the Commission. To avoid unnecessary repetition petitioner accordingly adopts and relies upon the arguments presented by the Commission to the Federal Courts upon this point.

Point II

Even if the Federal Arbitration Act of 1925 Were Applicable in Certain Cases, the Compulsory Arbitration Clause of the Customer's Agreement Could Not Be Invoked in the Case at Bar.

The Federal Arbitration Act of 1925 provides that arbitration agreements cannot be enforced if there are grounds in law or in equity for the revocation of the contract.[2]

The agreement of the parties herein provides that any provision "shall be deemed modified or superseded"[3] by any statute which is in any manner inconsistent with such provision. The arbitration clause in the agreement refers to "any controversy between us under this contract."

The above agreement was signed just prior to the opening of the petitioner's account with the respondent, and Petitioner purchased securities on the basis of fraudulent representations made by the respondent. Such representations necessarily affected all of the terms and provisions of the customer's agreement. In the absence of any denial by the respondent of the making of fraudulent representations, they must be assumed to have been made, and grounds at law or in equity for the revocation of the agreement must have necessarily existed. Hence the Federal Arbitration Act of 1925 by virtue of its own provisions must be inapplicable.

---

[2] See U.S. Code Annotated, Title 9, Section 10.

[3] See Customer's Agreement herein.

The Customer's agreement herein contains many provisions as to the respective rights and liabilities of the parties, including an exculpatory clause favoring respondents, which the Court of Appeals for the 2d Circuit has already found to be void and illegal. Many respondents and other brokerage houses insist that an agreement be signed before the customer may open an account and commence dealing in securities. These conditions amount to duress as a matter of law (3a—3b):

3a—Probably the most comprehensive as well as the most recent discussion of the subject of non-waiver provisions of the civil liabilities of the SEC statutes generally is to be found on pages 1074-1077 of "SECURITIES REGULATION" by Louis Loss, published by Little Brown & Co. in the latter part of 1951[4] From page 1075 of the above volume we quote as follows:

> "All six SEC statutes specify that any condition, stipulation or provision binding any person to waive compliance with any provision of the act or any rule of the Commission '*shall be void.*'"

3b—Further on page 1076 of "SECURITIES REGULATION" appears the following:

> "In a recent (1951) opinion of the General Counsel, he ruled that 'the anti-fraud provisions of the SEC statutes are violated by the employment of any legend, hedge clause or other provision, which is likely to lead any investor to believe that he has in any way, waived any action he may have.'"

---

[4] Louis Loss is the former Associate General Counsel of the Securities & Exchange Commission, and is presently on the faculty of the Harvard Law School.

Point III

United States District Courts Have No Right To Supervise the Conduct of an Arbitration Proceeding

The majority of the bench in the Circuit Court of Appeals herein was obviously troubled by the fact that the Securities Act of 1933 shifts the burden of proof from the purchaser to the seller of securities, and was aware that arbitrators are not required to observe the rules of evidence or rules of proof. It met this uncomfortable situation by suggesting that, if the arbitrators failed to comply with the requirements of the Securities Act of 1933, the District Court could, by invoking its "powers" to supervise the arbitration, set aside the award of the arbitrators herein.

The Federal Arbitration Act of 1925 confers no authority upon federal courts to supervise the conduct of an arbitration. Nor does any other statute. On the contrary, the arbitration agreement signed by the parties herein and the Courts (including this court) have held that the award of the arbitrators is final, and may not be reviewed, except in certain situations involving corruption, partiality and similar misbehavior on the part of the arbitrators. ([5]) ([6])

Summary of Argument

Petitioner maintains:

1. The compulsory arbitration provisions of the customer's agreement signed by the petitioner and the respondent are void under the non-waiver provisions of the Securities Act of 1933.[7]

---

[5] U.S.C.A. Title 9, Section 10, including in particular *Shanferoke Coal and Supply Corporation* vs. *Westchester Service Corp.*, 70 Fed. 2,297 and 293 U.S. 449.

[6] *American Almond Products Co.* vs. *Consolidated Pecan Sales Co., Inc.*, 144 Fed. 2d 448 et seq.—C.C.A. 2d Circuit 1944.

[7] 15 U.S. Code Annotated Sections 77L and 77N.

2. Even if the Federal Arbitration Act of 1925 was generally applicable, the compulsory arbitration provisions of the customer's agreement herein, could not be invoked in the case at bar.[8]

3. The United States District Courts have no authority to supervise the conduct of an arbitration proceeding involving securities transactions in violation of the express provisions of the Securities Act of 1933, as well as other Acts amendatory and supplementary thereto.

HENRY E. MILLS,
Attorney for Petitioner,
20 Pine Street,
New York, N. Y.

RICHARD H. WELS,
Of Counsel,
551 Fifth Avenue,
New York, N. Y.

[8] 9 U.S. Code Annotated.